IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Appeal No. 234 of 2006

Date of decision :- 14.09.2007

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :- 14.09.2007 Initials of Judge

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

Criminal Appeal No. 234 of 2006

Mustkeem S/o Zahid
R/o Village Kamalpur
P.S. Fatehpur,
District Saharanpur ...Appellant

Versus

State ...Respondent

Mr. Anwar Ahamad Siddiqui, Advocate for the appellant.
Mr. Amit Bhatt, Addl. Government Advocate for the respondent.

Dated:- 14th September, 2007

Coram: Hon'ble J.C. S. Rawat, J.
Hon'ble Dharam Veer, J.

Hon'ble J.C.S. Rawat, J. (Oral)

This appeal has been directed against the judgment and order dated 06.10.2006, passed by learned Additional Sessions Judge/F.T.C. Roorkee in Sessions Trial No. 325 of 2003, whereby the appellant has been convicted and sentenced to undergo imprisonment for life and to pay fine of Rs.5000/- under section 302 I.P.C. In default of payment of fine, the appellant was to undergo for further one year's R.I. However, the appellant was acquitted from the charge under section 25 Arms Act.

2. The facts, in nutshell, are that Islam PW2 got scribed the report through Abdul Aziz PW8 on 10.08.2003 in which it has been mentioned that Mohseena was married with the accused/appellant Mustkeem about ten years back. The accused/appellant was not happy with the marriage and also with Mohseena. The accused/appellant

wanted to keep Yasmin, the younger sister of Mohseena, with him as his wife for which her father was not ready. The father of Yasmin settled her marriage with Furkan. The accused/appellant was annoyed with the proposed marriage and he threatened the father of Yasmin to kill him. In the intervening night of 09/10.08.2003 at about 1:00 a.m., the father of the complainant was sitting in the varanda alongwith his daughter Yasmin PW1. They were watching the picture in the T.V. The other family members were also watching the picture. In the meantime, the accused/appellant and his associates came at the place of occurrence and they wanted to take Yasmin from the place of occurrence, on which the father of the complainant resisted and made hue & cry on which the accused/appellant fired upon him. Karimuddin, the father of Yasmin sustained the injuries and fell on the ground at the spot. Immediately the witnesses reached at the spot and tried to apprehend the accused/appellant and other miscreants but they fled away from the place of occurrence and they could not be apprehended by the people gathered there. Thereafter, Islam alongwith other villagers took the deceased to Roorkee Hospital where he was declared dead by the doctor. Thereafter, the report was lodged at the police station and the dead body was sent for the post mortem. The post mortem was conducted by Dr. K.K. Karoli PW12. The police recorded the statements of the witnesses and started the investigation of the case. After completion of the investigation, the police submitted the chargesheet against the accused/appellant.

3. After submission of chargesheet, the accused/appellant was committed to the court of Sessions for trial and the trial court framed charges u/s 302/34 I.P.C. against the accused-appellant. The appellant-accused denied the charges levelled against him and claimed for trial.

4. The prosecution in support of its case examined as many as 12 witnesses. Yasmin PW1 – daughter of the deceased, Islam PW2 – son of the deceased, Wahid PW3 – cousin of the deceased, Smt. Muntaha PW4 – daughter-in-law of the deceased and Moh. Yamin PW5 were said to be the eye-witnesses of the incident, but all these witnesses have not supported the prosecution version and they were declared hostile by the prosecution. Iqbal PW6 was the 'punch' witness of the inquest report. Smt. Asgari PW7 was the sister of the deceased. She has not supported the prosecution case and as such she was also declared hostile by the prosecution. The prosecution also adduced the evidence of Abdul Aziz PW8 who scribed the F.I.R. He had stated that he scribed the F.I.R. but he had not supported the rest of the prosecution version and he was declared hostile by the prosecution. Sarvesh Shukla PW9 is the Head Constable who recorded the F.I.R. and made the necessary entries in the G.D. for lodging the report. Shyam Lal Sharma PW11 had investigated the case u/s 25 Arms Act in which the accused has been acquitted by the trial court. Dr. K.K. Karoli PW12 is the autopsy surgeon who conducted the post mortem of the dead body of the deceased.

5. The accused-appellant was examined u/s 313 Cr.P.C. and he has pleaded not guilty to the offence. He has stated that he has been falsely implicated in this case. The accused/appellant has further stated that he is innocent and he had not committed the murder of the deceased. He has further challenged the report of brain mapping and he has stated that he had not committed the murder, as such, the report is not correct. He had not adduced any evidence in support of his defence.

6. The learned Sessions Judge on appreciation of the evidence held the accused-appellant guilty and convicted and sentenced him as mentioned above.

7. We have heard learned counsel for the parties and perused the record.

8. At the outset, it needs to be mentioned here that it is not disputed that the death of Karimuddin occurred in the intervening night of 09/10.08.2003 at about 1:00 p.m. In addition to that, the prosecution adduced the evidence of Dr. K.K. Karoli PW12 who conducted the autopsy on the dead body of the deceased Karimuddin and found the following injury on his person:-

> "जख्म प्रवेश के बायें तरफ पेट पर उपर के 1/3 हिस्से पर बाहर की और तथा सीने की सबसे निचली पसली के पास नीचे माप 6 cm. X 4cm. एवं केविटी तक, गहरा जिस पर खून लगा था व खरोंच, झुलसन, तथा टेटुउंग मोजूद थी। छरै आंतों की लूप के संग बाहर दिखाई दे रहे थे जेसे कि आंत बाहर निकली हुई थी।"

9. It is apparent from the post mortem report that the deceased sustained the gun shot injury on his person. Dr. K.K. Karoli PW12 has further stated that the death of the deceased could have been occurred due to firearm injury sustained in the intervening night of 09/10.08.2003 at about 1:00 a.m. Thus, it is apparent from the medical report also that the death occurred in the intervening night of 09/10.08.2003 at about 1:00 a.m. by the gun shot injury sustained by the deceased Karimuddin. Yasmin PW1, Islam PW2, Wahid PW3 and Smt. Muntaha PW4 and Moh. Yamin PW5 have also established that the death of Karimuddin occurred on the date and time indicated by the prosecution.

10. Now, we have to discuss as to who is responsible for causing the injury on the person of deceased Karimuddin. The prosecution in support of its case examined Yasmin PW1. She is the daughter of the deceased Karimuddin and on the date of occurrence she was watching T.V. alongwith her father. She has stated that at about 1:00 a.m. at night some people came from outside and fired upon her father. She has further stated that other family members were inside the house. She has categorically stated that she could not identify the miscreants who shot fire upon her father. She was declared hostile. The prosecution also adduced the evidence of Islam PW2. He is the son of the deceased. He has stated that he was inside the house and when he heard noise of fire, he came out from the room and found that his father was lying on the varanda. He has further stated that he could not identify the accused who committed the murder of his

father. He was also declared hostile. Wahid PW3 is the cousin of the deceased. At the time of the occurrence, he was also inside his house. When he heard the noise of fire, he came out but he could not identify the miscreants. He was also declared hostile by the prosecution. Smt. Muntaha is the daughter-in-law of the deceased and she has stated that she was sleeping inside the room on the date of occurrence. On hearing the fire shots, she came to the varanda and found her father-in-law lying in the varanda in an injured condition. She did not know as to who had fired upon the deceased. Mohd. Yamin PW5 has stated that the police have not recovered any blood stained clothes in his presence and the Inspector has got his signature on the blank paper in the police station. Iqbal PW6 has stated that police has prepared the panchnama in his presence and his thumb impression was taken in it. The prosecution witnesses Yasmin PW1, Islam PW2, Wahid PW3 and Smt. Muntaha PW4 have stated that they could not recognize the assailants, as such, the entire oral evidence is not supporting the prosecution version.

11. In view of the above, the ocular testimony could not establish the guilt against the accused/appellant. Yasmin PW1, Islam PW2, Wahid PW3 and Smt. Muntaha PW4 had not recognized the accused/appellant as the assailant. The learned trial court has also held that there is not ocular testimony to support the prosecution version.

12. The learned trial court after conclusion of the evidence directed the Station Officer of the Police

Station Bhagwanpur to take steps for brain mapping and finger prints of the accused/appellant from the Forensic Laboratory Bangalore. It is apparent from the record that there was no application on record for further investigation of the case and no request for the brain mapping of the accused/appellant on behalf of the prosecution. The power of investigation vests upon the police and the power of investigation is an independent power of the police and it is not restricted under the provisions of the Criminal Procedure Code. If any report is lodged u/s 154 Cr.P.C. of a cognizable offence, the police immediately starts the investigation of the case. The police has a statutory right to investigate into the circumstances of any alleged cognizable offence without authority from the Magistrate or the Court. The power of police to investigate cannot be interfered by the court. Even if the petition is filed u/s 482 Cr.P.C. the High Court cannot direct the manner of the investigation to be done by the investigating agency. The proceedings before the police investigation are proceedings over which the police alone have full control, and neither the Magistrate nor even the High Court has power to interfere with such proceedings. In respect of the cognizable offences, the powers of police and Magistracy are not overlapping but are complimentary and the police should be left free to exercise their statutory functions of completing their investigation. Now it is to be seen as to whether the Additional Sessions Judge was justified in directing the S.H.O., Bhagwanpur for brain mapping of the accused/appellant. It is also pertinent to mention here that the learned Additional Sessions Judge has relied

upon section 311 of the Cr.P.C. Section 311 of the Cr.P.C. provides as under :-

> "311. Power to summon material witness, or examine person present. – Any Court may, at any stage of inquiry, trial or other proceeding under this Code, summon any person as a witness, or recall and re-examine any attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

13. Perusal of the said section clearly reveals that the Court at any stage of inquiry, trial or other proceeding, can call material witnesses or examine any person at the time of hearing. This section does not empower the court to make order for the brain mapping of the accused. The learned trial court had erred in holding that the trial court was competent to direct the police to send the appellant for the brain mapping test at Bangalore. The power u/s 311 Cr.P.C. does not confer a right to send the accused for the brain mapping. There was no application to the Magistrate for seeking direction for further investigation in the matter. The learned Addl. Sessions Judge was not competent to direct the brain mapping after conclusion of the evidence on his own motion. Such order of the court would amount to direct the I.O. to the manner of investigation to be conducted further. The Investigation

of a criminal case is completely under the domain of the police and the Sessions Judge has no jurisdiction to direct the manner of investigation in a particular way. The Court cannot interfere with the investigation at any stage. In view of the above, the direction of making the brain mapping test was outside the jurisdiction of the trial court.

14. Apart from this, the said order was challenged before this Court u/s 482 Cr.P.C., the learned Single Judge vide its order dated 21.09.1006 quashed the order dated 05.05.2006 passed by the learned Additional Sessions Judge, Roorkee in Sessions trial No. 325 of 2004 (Sessions Trial number was wrongly mentioned in the judgment of learned Single Judge, though the correct session trial number was 325 of 2003). The learned Single Judge has observed as under: -

> *"3. Learned counsel for the petitioner, challenged the impugned order, also on the ground that it is hit by Clause (3) of Article 20 of the Constitution of India, which provides that "no person accused of any offence shall be compelled to be a witness against himself".*
>
> *4. After hearing the parties and going through the impugned order, this Court is of the view that as there is no express provision, empowering the trial court to pass an order to order brain mapping of an accused, against whom all the prosecution witness of fact, have turned hostile, the impugned order cannot be sustained in law. Accordingly, the impugned order dated 05.05.2006, passed by learned Additional Sessions Judge, Roorkee in Sessions Trial No. 325 of 2004 is set aside. However, the trial court may proceed further with the trial of the case. The petition under Section*

482 Cr.P.C., stands disposed of. (All pending applications in this case, also stand disposed of)."

15. Inspite of the order of this Court, the trial court has relied upon the brain mapping test conducted pursuant the order of the learned Sessions Judge which was quashed by the High Court and convicted the accused solely on the basis of brain mapping test. The trial court has observed as follows:-

> "इन सारे तथ्यों को जानने के लिए न्यायालय द्वारा धारा 311 दंप्रसं व साक्ष्य अधिनियम की धारा 164 में अभियुक्त की ब्रेन मैपिंग के लिए आदेशित किया गया था। अभियुक्त का ब्रेन मैपिंग टेस्ट दिनांक 7 व 8 जुलाई को कर दिया गया था एवं रिर्पोट न्यायालय में दिनांक 06.9. 2006 को प्राप्त हो चुकी थी और अभियुक्त के विद्वान अधिवक्ता को यह रिर्पोट दिनांक 14.9.2006 को उपलब्ध करा दी गयी थी। दंप्रसं की धारा 293 के अनुसार रिर्पोट पर प्रदर्श–21 डाल दिया गया था। इस रिर्पोट के विषय में अभियुक्त से बयान अन्तर्गत धारा 313 दंप्रसं में प्रश्न पूछ लिया गया था। लेकिन दुर्भाग्यवश इस तथ्य को लोक अभियोजक द्वारा दिनांक 21.9.2006 को माननीय उच्च न्यायालय के समक्ष नहीं रखा गया।"

16. Perusal of the above, it is revealed that the trial court emphasized that the report had been received on the date when the High Court passed the order and it had already been exhibited. It is also apparent from record that the brain mapping test of the appellant was conducted pursuant to the order of the learned trial court which was ultimately quashed by the High Court. If the order directing to conduct the brain mapping test had been quashed by the High Court, the Addl. Sessions Judge was not justified to rely upon the reports of the brain mapping test and other

consequences flowing from the order dated 05.05.2006. Thus, the learned Sessions Judge has erred in relying upon the brain mapping test.

17. In the case of **Sompal Singh Vs. Sunil Rathi & another 2005 (1) SCC 1,** the Hon'ble Apex Court has held as follows:-

> "**"7.1.** *A reading of the impugned order shows that instead of considering the matter de novo in the light of the observations made by this Court, the whole effort of the learned Judge has been to give justification for the order earlier passed by him on 30-5-2003 by which bail was granted to the accused. At various places, the learned Judge has referred to his earlier order and has tried to justify the same. A long passage from the earlier order has been reproduced and at a later stage it is said-*
>
> > *"though that fact is not mentioned but a perusal of my order dated 30-5-2003 in its totality leads to the conclusion that I had applied myself quite consciously to the facts available on record and thereafter the accused was enlarged on bail by me by the said order".*
>
> ***8.*** *This Court while setting aside the bail granted to the accused at earlier occasion had specifically said that the fact that the accused had several other accusations to his credit had not received consideration at the hands of the High Court. In the bail application which was filed afresh in the High Court wherein the impugned order has been passed on 27-5-2004, the applicant had himself given details of seven criminal cases in which he is involved. Some of them are quite serious, namely, (i) Crimes Nos. 89 and 91 of 2001 under Sections 307/420/468 IPC, PS Kankhal, Haridwar; (ii) Crime No. 135 of 2001 under Sections 2/3, the*

U.P. Gangsters and Anti-Social Activities (Prevention) Act, PS Kankhal, Haridwar; (iii) Crime No. 63 of 2001 under Sections 2/3, the U.P. Gangsters and Anti-Social Activities (Prevention) Act, PS Lal Kurti, Meerut; (iv) Crime No. 238 of 2001 under Sections 302/120 IPC, PS Lal Kurti, Meerut; (v) Crime No. 125 of 2001 under Sections 147/138/307 IPC, PS Charthawel, Muzaffarnagar; and (vi) Crime No. 40 of 2000 under Sections 302/307/96 IPC, PS Okhla, Delhi. Instead of giving due consideration to the aforesaid fact, namely, on account of involvement of the accused in several other criminal cases whether a discretion of granting bail should be exercised in his favour, the learned Judge merely said that when the bail application was heard by him at the earlier stage, the fact regarding involvement of the accused in other cases was not brought to his notice and again brushed aside the said point by stating as under:

> *"No counsel for the complainant appeared in my Court to oppose the said bail application at that stage. Therefore, I had heard only learned AGA. It cannot be said with certainty that any fact with regard to the criminal antecedents were brought by learned AGA in my notice, so it might have slipped attention."*

13. In the hierarchical judicial system, it is not for any court to tell a superior court as to how a matter should be decided when an appeal is taken against its decision to that superior court. Such a course would be subversive of judicial discipline on the bedrock of which the judicial system is founded and finality is attached and orders are obeyed. We do not consider it proper to say anything further and would like the matter to rest there."

18. In view of the above, the learned Sessions Judge erred in relying upon the brain-mapping test inspite of the High Court's order dated 21.09.2006 passed in Criminal Misc. Application No.504 of 2006 (u/s 482 Cr.P.C.). Thus, we do not approve the approach of the learned Sessions Judge in relying upon the brain mapping test.

19. Learned counsel for the appellant further contended that the appellant was tested on two sets of questions as pointed in the report. The first set relates to the prosecution case whereas the second set relates to different story. The brain mapping test has disclosed a different theory which is not the prosecution case at all. The learned Addl. Sessions Judge has relied upon the second set of questions and held that the prosecution case is proved against the appellant on the basis of second set of brain mapping test. For the sake of convenience, both sets of brain mapping test are placed below:-

> *a) "Pre-recording: The words were presented in Hindi in the "Auditory Mode" only. The words were programmed and present in a random order through STIM program. The EEG ad ERP responses were acquired by the 32 channel EEG-ERP Neuro SCAN recording system. The target sentences were so designed to elicit any concealed/encoded information:*
>
> *Set 1:*
>
> 1. *Working at rice mill at Nambisar.*
> 2. *Getting married to sister-in-law.*
> 3. *Planed to divorce wife.*
> 4. *Father-in-law refused Mustakeem to get married to sister-in-law.*
> 5. *Plan to eliminate Father-in-law.*
> 6. *Used desi pistol to murder.*
> 7. *Murder Father-in-law mid-night by desi pistol.*

8. *Thrown pistol to Kandar.*
9. *Murdered Father-in-law as he refused to give daughter for marriage.*
10. *Disinterested with wife.*

Set 2:

1. *Working in rice mill on August first.*
2. *Murder at buva's residence.*
3. *Father-in-law eye-witness to murder.*
4. *Amount paid for not to give evidence.*
5. *Came alongwith Pradhan to made payment.*
6. *Kareemuddin refused to accept money.*
7. *Murdered Kareemuddin as he refused to accept money.*
8. *Sathar associate murdered using katta pistol.*
9. *Arvind Kumar fired pistol used in Kareem murder.*
10. *Katta pistol fired at Bhavanpur Police Station."*

20. The trial court had relied upon the second set of brain mapping test and convicted the accused by introducing a third story. It is also a surprising factor that the case of the prosecution is not based on the second set of question. Thus, the prosecution could supply the second set of question. The learned counsel for the parties could not demonstrate us on record who supplied the second set of questions to the expert. It cannot be said that the second set of question was imaginary because the list shows that the second theory mentioned in the report is correct. It is also pertinent that the brain mapping test was conducted at the behest of the court. The learned counsel could not resolve this mystery from the record. It is also pertinent to mention here that the accused appellant had not pleaded this theory in his statement recorded

under section 313 Cr.P.C. It is apparent that there is no substantive piece of evidence against the appellant. The evidence of brain mapping is not a substantive piece of evidence. It has only probative value. The report of brain mapping test is admissible under section 45 of the Indian Evidence Act. The case involving the issue of expert evidence the Court should only consider that whether it corroborates the prosecution story or not. The prosecution has entirely narrated the different story whereas the brain mapping test states a different story and it did not corroborate the prosecution version at all. Thus, the brain mapping test has no value at all. It has been held by the Hon'ble Apex Court in **Ranjitsing Brahmajeetsing Sharma Vs. State of Maharashtra 2005(5) SCC 294**:-

> **73.** *Apart from the fact that nothing has been brought on record to show as to how far a report of brain mapping test can be relied upon, the report appears to be vague. It appears, the respondents themselves did not want to put much reliance on the said report.*
> ***74.*** *Furthermore, the admissibility of a result of a scientific test will depend upon its authenticity. Whether the brain mapping test is so developed that the report will have a probative value so as to enable a court to place reliance thereupon, is a matter which would require further consideration, if an when the materials in support thereof are placed before the court.*
> ***75.*** *In Frye v. United States 293 F 1013 (DC Cir) 1923 the principles to determine the strength of any investigation to make it admissible were stated in the following terms:*
>
> *"Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in the twilight zone the evidential force must be recognised, and while the courts will go a long way in admitting the expert testimony deducted from a well-recognised scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to*

have gained general acceptance in the particular filed to which it belongs."

Frye 18, however, was rendered at a time when the technology, the polygraph test, was in its initial stage and was used in few laboratories. The guidelines issued therein posed a threat of lack of judicial adaptation of the new developments and ignored the reliability on a particular piece of evidence.

76. *A change of approach was, however, found in Daubart v. Merryll Dow Pharmaceuticals Inc. 113 S Ct 2786 (1993) where the courts while allowing "general acceptance" stated that this might not be a precondition for admissibility of the scientific evidence, for which the court may consider the following:*

(a) Whether the principle or technique has been or can be reliably tested?
(b) Whether it has been subject to peer review or publication?
(c) Its known or potential rate of error?
(d) Whether there are recognised standards that control the procedure of implementation of the technique?
(e) Whether it is generally accepted by the community? And
(f) Whether the technique has been introduced or conducted independently of the litigation?

77. *In a case involving an issue as to whether on-job exposure to the manufacturers' products promoted small-cell lung cancer, the US Supreme Court in General Electric Co. v. Robert K. Joiner 522 US 139 (1997) following Daubart (supra) held that in cases involving the issue of expert evidence the appellate court should only consider whether there is any abuse of discretion in admitting such evidence by the trial courts and should not go into reviewing the evidence itself as it is for the trial courts to assume the "gatekeeper's role" in screening such evidence to ensure whether it is not only relevant but also reliable. This was further expanded in Kumho Tire Co. Ltd. V. Carmichael 119 S Ct 1167 (1999) whereby the "gatekeeping" obligation of the trial Judge to ensure the relevancy and reliability for admitting the evidence extended not only to scientific but also to all kinds of expert evidence.*

78. *In R. v. Watters I 2000 All ER (D) 1469 it was held:*

"DNA evidence may have a great significance where there is supporting evidence,

dependent, of course, on the strength of that evidence.

…….in every case one has to put the DNA evidence in the context of the rest of the evidence and decide whether taken as a whole it does amount to a prima facie case."

21. It is well settled position of law that the prosecution has to stand on its own legs. The trial court has held as under :-

"47 – उपरोक्त रिर्पोट में फोरेन्शिक साईंस लेबोरेट्री माडीवाला बंगलौर ने सितम्बर 2, में यह तथ्य वर्णित किये हैं कि अभियुक्त चावल मिल में पहली अगस्त को काम करता था, हत्या बुआ के घर में हुई है। यह बुआ मृतक करीमुदीन की बहन असगरी है और अभियुक्त मुस्तकीम की पत्नी की बुआ है। क्योंकि इसकी पत्नी की बुआ है, इसलिए इसे बुआ कहता है। किसी कत्ल के मुकदमें में अभियुक्त का ससुर करीमुदीन गवाह था, उसको गवाही न देने के लिए रूपया देना था, प्रधान के साथ भुगतान करने के लिए आया, करीमुदीन द्वारा रूपया लेने से मना किया गया क्योंकि करीमुदीन ने रूपया लने से मना किया इसलिए उसका कत्ल किया। कटटा सत्तार के साथी द्वारा चलाया गया था, जिस तमन्चे को अभियुक्त पर दिखाया गया है, उसको अरविन्द ने चलाया था और यह भगवानपुर थाने पर चलाया था। ब्रेन मैपिंग रिर्पोट में यह तथ्य आया है। यह वैज्ञानिक तरीके से अभियुक्त के दिमाग में छिपे हुऐ तथ्य को निकाला गया है। इस तथ्य का कोई खन्डन नहीं है। हेमेन्द्र सिंह नेगी पीडब्लू – 10 का यह कथन कि घटनास्थल का कोई नक्शा नजरी पत्रावली पर नहीं है, इस तथ्य से साबित हो जाता है कि जो घटनास्थल अभियोजन द्वारा बताया गया है, उस पर करीमुदीन को नही मारा गया था। इसलिए श्री हेमेन्द्र सिंह नेगी विवेचक द्वारा कोई नक्शा नजरी नहीं बनाया गया है। घटनास्थल से कोई खून आलूदा या सादा मिट्टी भी नहीं ली गयी है। इस तरह से अपराध को

बदलने में विवेचक का पूरा हाथ है। प्रधान जो रूपया लेकर गया था और जिसके सामने कत्ल हुआ है, यह गवाह पीडब्लू – 7 अब्दुल अजीज है और इसके द्वारा स्वयं को अलग करते हुए दूसरी तरह से रिर्पोट लिखायी गयी है। ब्रेन मेपिंग रिर्पोट में इस बात की पुष्टि नहीं हुई है कि अभियुक्त अपनी पत्नी से उब चुका था, और वह अपनी साली से शादी करना चाहता था, करीमुदीन ने मना किया और इसलिए मुस्तकीम ने उसकी हत्या कर दी, बल्कि कारण यह है की करीमुदीन को गवाही से रोकना चाहता था, प्रधान व अभियुक्त रूपया लेकर गये थे और जब करीमुदीन ने मना किया तो उसका कत्ल कर दिया गया। विवेचक हेमेन्द्र सिंह नेगी का पूरा काम प्रधान को बचाने का है। जहॉ कटटे का प्रश्न है, कटटा थाना भगवानपुर में अरविन्द द्वारा चलाया गया। अभियुक्त से कोई बरामदगी नहीं है। इस रिर्पोट को यदि नकार दिया जाये तो फिर न्याय की जगह अन्याय हो जाएगा।

48 – अभियुक्त की ब्रेन मेपिंग से यह बात सामने आ गई है कि क्या अभियुक्त हत्या में लिप्त है और जिस तरह से अभियोजन ने कहानी कही है, उस तरह से हुई है। यह वैज्ञानिक परीक्षण है, और इस वैज्ञानिक परीक्षण का कोई खण्डन नहीं है, बल्कि इस वैज्ञानिक परीक्षण ने अभियुक्त पर अग्नेयास्त्र की कहानी को विफल कर दिया है। यह वैज्ञानिक परीक्षण रिर्पोट अभियुक्त के विरूद्ध ही नहीं है, बल्कि अभियुक्त के पक्ष में भी है। इस रिर्पोट ने यह साबित का दिया है कि पुलिस द्वारा अरविन्द से थाना भगवानपुर पर कटटे से फायर करवाया गया और उस कटटे को अभियुक्त से बरामद दिखा दिया है।

49 – दंप्रसं की धारा 293 में संसोधन करके फोरेन्शिक साईंस लेबोरेट्री की रिर्पोट राजकीय वैज्ञानिक विशेषज्ञ की रिर्पोट है और वह साक्ष्य में पढी जायेगी। यह न्यायालय इस रिर्पोट को नजरअन्दाज नहीं कर सकता है। रिर्पोट के साथ–साथ फोटोग्राफ भी साईंस लेबोरेट्री द्वारा प्रस्तुत

किये गये हैं, यह प्रदर्श – हैं। इस रिर्पोट में जो ग्राफ बताये गये हैं, उनमें अभियुक्त का 1 अगस्त को चावल मिल में नियुक्त होने के विषय में ग्राफ एकदम उपर गया है। इस रिर्पोट में दिये गये फोटोग्राफ से यह बात स्पष्ट हो जाती है कि अभियुक्त द्वारा अपनी पत्नी की बुआ असगरी के घर मे करीमुदीन की हत्या की गयी थी। अभियुक्त मृतक को गवाही न देने के लिए रूपया देने के लिए आया था। उसके साथ प्रधान भी रूपया देने के लिए साथ था। जबकि अभियुक्त का ससुर करीमुदीन हत्या के मुकदमें में चश्मदीद गवाह था, उसने रूपये लेने से इन्कार किया तब करीमुदीन की हत्या की गयी। गोली सत्तार के साथी द्वारा चलायी गयी थी। अभियुक्त पर लगाया गया कटटा अरविन्द कुमार द्वारा चलाया गया था और यह भगवानपुर का था।

50 – उपरोक्त तथ्यों से यह निष्कर्ष निकलता है कि अभियुक्त करीमुदीन की हत्या में शामिल था। चूँकि कट्टा भी पहले से साथ लाया गया था, यह रूपया देने में साथ था। करीमुदीन द्वारा रूपया लेने से इन्कार करने पर ही उसकी हत्या हुई है। इसलिए अभियुक्त के विरूद्ध हत्या का अपराध संदेह से परे साबित है। जबकि अभियुक्त के कथित तमन्चे की बरामदगी संदेह से परे साबित नही है।"

22. It is well settled position of law that the prosecution has to stand on its own legs. It cannot take advantage of the weaknesses of defence. The court cannot make out a new case for the prosecution and convict the accused. It is no doubt that the court should make every effort to disengage the truth from the falsehood and to sift the grain from the chaff rather than to take the easy course of rejecting the entire prosecution case merely because there are some embellishments. It is also relevant in the said process of appreciation of evidence, the court cannot

reconstruct a story its own to convict the accused. In the case of **Ugar Ahir & others Vs. The State of Bihar AIR 1965 SC 277,** the Hon'ble Supreme Court has held as follows:-

> "*6. The maxim falsus in uno, falsu in omnibus (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest. That is what the courts have done in this case. In effect, the courts disbelieved practically the whole version given by the witnesses in regard to the pursuit, the assault on the deceased with lathis, the accused going on a bicycle, and the deceased wresting the bhala from one of the appellants and attacking with the same two of the appellants, the case that the accused attacked the witnesses, and the assertion of the witnesses of their being disinterested spectators. If all this was disbelieved, what else remained? To reserve the metaphor, the courts removed the grain and accepted the chaff and convicted the appellants. We, therefore, set aside the conviction of the appellants and the sentence passed on them.*"

23. In the case of **Sohrab and another Vs. State of Madhya Pradesh, AIR 1972 SC p/2020,** the Hon'ble Apex Court affirmed the above view which is as follows:-

"*7. We have at some length pointed out that the Sessions Judge and the High Court were in agreement on certain aspects of the case in respect of which witnesses tried to embellish and exaggerate. But that by itself, in our view, does not assist the accused, nor can the broad features of the evidence of the prosecution case be doubted in respect of the version that on the day of the occurrence both the appellants and the deceased were in the field where the dead body was found, that Sohrab was riding a mare, that he chased the deceased, that Nadar came with a gun and handed it over to Sohrab and that Sohrab fired at the deceased, which also caused injury to Nadar. The position of the eye-witnesses in relation to the occurrence may have been such that all the details could not have been noticed, but that the salient features of the prosecution story were true is established by the evidence of the eye witnesses. It appears to us that merely because there have been discrepancies and contradictions in the evidence of some or all of the witnesses does not mean that the entire evidence of the prosecution has to be discarded. It is only after exercising caution and care and sifting the evidence to separate the truth from untruth, exaggeration, embellishments and improvement, the Court comes to the conclusion that what can be accepted implicates the appellants it will convict them. This Court has held that falseus in uno falsus in omnibus is not a sound rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked about details venture to give some*

> *answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautious scrutiny cannot be considered though where the substratum of the prosecution case or material part of the evidence is disbelievable it will not be permissible for the Court to reconstruct a story of its own out of the rest. It is also urged that in an appeal against acquittal, the appellate court must consider the reasons which impelled the trial court to acquit the accused but whereas in this case the High Court having agreed with most of the conclusions arrived at by the Sessions Judge it could not reverse the order of acquittal.*"

24. In view of the above, the learned Addl. Sessions Judge fell in manifest error to reconstruct a different theory as alleged by the prosecution. Thus, the findings recorded by the trial court is also liable to be vitiated on that ground alone.

25. It was further pointed out that at the instance of the appellant the recovery of country-made pistol was made on 29.08.2003 from a dilapidated building. It was recovered by Hemant Singh Negi PW10. He has also tried to collect the witness of recovery, but he could not get any public witness so he took the police witnesses. Learned counsel for the appellant contended that the discovery at the instance of appellant is not credible and cogent and it cannot be relied upon. It was further pointed out that the witnesses of the recovery have not been produced

before the court. Assuming that the discovery was made at the instance of appellant, it has to be considered as to whether this circumstance itself is sufficient to convict the appellant. If there is no other prosecution evidence against the accused, the evidence of recovered article by himself would not take the prosecution case any further. In the case of **State of M.P. Vs. Kriparam 2005 SCC (Cri) 830,** the appellant and two others were charged under section 302/34 IPC for committing the murder. The prosecution alleged that three accused persons attacked the deceased with deadly weapons and the deceased died instantaneously. During the course of investigation, the prosecution alleged that it recovered blood-stained clothes worn by the accused as also blood-stained axe which was used in attacking the deceased. The trial court convicted all three accused persons under section 302/34 IPC. In appeal, the High Court on re-appreciation of the evidence came to the conclusion that the prosecution has failed to establish the case against the accused, hence acquitted the accused. When the matter came before the Hon'ble Apex Court, it has been held that there were two eyewitnesses of the incident and they were found unreliable. The prosecution also led the evidence of the recoveries allegedly made at the instance of the accused. The Hon'ble Apex Court has held as follows:-

> "*10. Similar is the case in regard to recovery of an axe. In regard to this, witnesses for the recovery say, they found a small stain of blood on it. The serologist in regard to this blood also states that it is not possible to find out the origin of the same. Therefore, even this recovery would not in any manner help the prosecution in this*

case. Even otherwise, if the prosecution case in regard to PWs 1 and 3 is not acceptable then these recoveries by themselves would not take the prosecution case any further."

26. In view of the above, there is no ocular testimony to support the prosecution version and there are no sufficient circumstances to take an inference that the appellant was involved in the commission of offence. We, therefore, hold that the prosecution has failed in establishing the guilt, beyond reasonable doubt, against the appellant. We find that the learned trial court has erred in convicting and sentencing the appellant. Hence, the appeal is allowed and the conviction and sentence against the appellant awarded by the trial court are set aside. The appellant be released at once if not wanted in any other case. Bail bond of appellant is cancelled and sureties discharged.

27. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within two months.

(Dharam Veer, J.) **(J.C.S. Rawat, J.)**

Dated 14.09.2007
LSR/Shiv